APPENDIX

STATUTES

28 U.S.C 2283. Stay of State court proceedings.

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

29 U.S.C 158. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the pe-

riodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter. . . .

Appendix A-3

OPINION OF THE NINTH CIRCUIT COURT OF APPEALS

[Caption deleted]

Before GOODWIN and CANBY, Circuit Judges, and BYRNE,* District Judge.

CANBY, Circuit Judge:

On April 30, 1980, the National Labor Relations Board affirmed a ruling by an administrative law judge that appellant Bill Johnson's Restaurants had committed unfair labor practices by discharging a waitress, interrogating other employees, and by threatening reprisals against and filing and prosecuting a state court lawsuit against picketers who were protesting unfair labor practices. The Board ordered the restaurant to reinstate the discharged waitress, with back pay, to reinstate the three other waitresses who went on strike and to withdraw the lawsuit from state court. The restaurant seeks review of the Board's order under section 10(f) of the National Labor Relations Act, 29 U.S.C § 160(f). The Board cross-petitions for enforcement. We enforce the order of the Board.

FACTS

The following facts were found by the administrative law judge and affirmed by the Board. In February 1972, Ruth Helton began working at Bill Johnson's Big Apple East, one of four restaurants owned and operated by Bill Johnson's Restaurants, Inc., in the Phoenix, Arizona, metropolitan area. The corporation is owned by the Johnson family. By summer 1978, Helton was one of the two most senior waitresses at the restaurant; since 1977 she had received an hourly bonus, and she served on the breakfast shift, which because of the hours and tips was the most desirable shift at the restaurant.

On July 25, 1978, Vice President Johnny Johnson called a meeting of employees to announce a new policy of strict enforcement of company rules. Among other things, Johnson told the waitresses that they must call in on days off, and that they could not chew gum while working or use the business phone for personal calls. Johnson ended by stating that any waitress who broke company

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* Honorable William M. Byrne, United States District Judge for the Central District of California, sitting by designation.

rules would be fired. The next day, a waitress on the breakfast shift who had not attended the meeting asked her supervisor, Suzie Gay, what had happened. Gay answered, "Nothing pertaining to the breakfast girls." The breakfast waitresses, as the most senior employees, had traditionally been excepted from some company rules. For example, they were not required to call in on days off, and they had been allowed to use the business phone for personal calls.

In the days after the speech, the waitresses discussed it extensively. Several waitresses agreed with Helton's suggestion that they needed a union to represent them. Discussions of unionization were held in the waitresses' lounge, at a nearby hotel, at a party where Supervisor Gay was present for at least part of the discussion, and in the restaurant during a coffee break while Gay was nearby.

On August 8, Helton worked her regular shift and went home. That afternoon, Gay called her and told her that she was fired. Helton asked why, and Gay answered that Johnny Johnson had not liked a question she had asked at the July 25 meeting. (Helton had asked only whether waitresses could sell customers a single pancake or had to sell orders of two.) Gay said also that Johnson did not like Helton's attitude. Helton asked for a written explanation, but Gay said that the restaurant was not required to give her one. On August 9, Helton filed a charge with the NLRB.

The day after Helton's discharge, Dirkson, a hostess, told Gay that all the waitresses thought Helton had been treated unfairly. Gay said that she didn't like firing Helton, but that "Ruth had been antagonizing the girls on the floor" and that she couldn't "run a shift with that type of friction." She then asked whether Dirkson knew "if Ruth had any contact with any of the girls." A few days later, after learning that Helton had filed a charge with the NLRB, Gay asked Dirkson if any other waitresses had been talking about the union.

On September 18, waitresses Nichols, Scott, and Michaud walked out of the restaurant without explanation. On the way out, they turned their checkpads in to the cashier. The cashier reported their leaving to Manager Lois Williams. That afternoon, the waitresses returned to fill out their tip reports. Williams told them that they could pick up their checks the next day. When Manager Sherry Sturgeon asked the waitresses why they had walked out, they responded that they thought Helton was fired unjustly, and complained about the treatment they had received since the July 25 meeting. Sturgeon told the waitresses that they could forget what Johnny Johnson had said at the meeting because she was back in charge

after her vacation. During the conversation, Scott stated that she was tired of waitressing. Nichols complained that her daily commute was too long. At no time did the waitresses say that they had quit their jobs, but Sturgeon told them to pick up their checks the following day.

On September 20, the Board issued a complaint against the restaurant, and the three waitresses joined Helton and a few others to picket the restaurant. Their picket signs said that the restaurant had been accused of unfair labor practices and asked the public to boycott the restaurant. The picketers walked along the sidewalk in front of the restaurant. Although they crossed two driveways which led to the restaurant parking lot, they did not block public access to the lots. At no time were there more than seven adults and two children picketing. That day, Sturgeon confronted the picketers and took down their names. She said, "You might think you're funny, but I intend to have the last laugh. I will get even with you for what you're doing." She told Helton that "I'll get even with you if it's the last thing I do." That afternoon, Gene Johnson telephoned waitress Cheryl Nichols and asked to talk with her husband. Johnson asked Carl Nichols why they had been picketing the restaurant. Carl said that they were protesting Helton's discharge. Then Johnson said that she would hate to see the Nichols lose their new home, and also that she would hate to see them "get hurt by all this."

On September 21 and 22, the picketing continued. On September 22, the picketers distributed a leaflet to the public. The leaflet stated:

> THE [NLRB] HAS ISSUED A COMPLAINT AGAINST THE BIG APPLE RESTAURANT . . . FOR UNFAIR LABOR PRACTICES.
>
> The complaint was issued as a result of charges filed by [Ruth] Helton, a former employee who was fired August 8 after suggesting to other waitresses they should organize a union. Mrs. Helton had been an employee of the Big Apple seven and one half years.
>
> Several other waitresses have quit their jobs to join Mrs. Helton in picketing the restaurant to inform the public of the dispute between the employees and the restaurant's management. Among the waitresses' complaints are the following:
>
> - Eight hour shifts with no specified breaks.
> - No pay for overtime when waitresses were required to remain at their posts until their last customer's check had been paid.

- Waitresses threatened with dismissal if they lost any time due to illness over the Christmas holiday season.
- Inconsistent management practices.
- Unwarranted sexual advances.
- A filthy restroom for women employees, with no soap, paper towels or toilet tissue provided.

EMPLOYEES OF BILL JOHNSON'S BIG APPLE FOR JUSTICE ON THE JOB.

On September 25, the restaurant filed a civil complaint in state court. The complaint alleged that the picketers had engaged in mass picketing, blocked public access to the restaurant, and created a threat to public safety. The complaint also alleged that the picketers had distributed a leaflet containing "false and outrageous statements, including misrepresentations of proceedings pending before the NLRB." The complaint sought actual damages, $500,000 in punitive damages, and an order enjoining the picketers from trespassing, mass picketing, violence, interfering with the restaurant's business operations, and publishing false and misleading statements about the restaurant and its management. That same day, the court issued a temporary restraining order granting most of the relief requested, and setting an October 5 hearing to consider the request for a preliminary injunction.

On September 26, the picketing continued, and Helton hired an attorney to represent her. On October 2, the restaurant's attorney deposed Helton, asking numerous questions about the nature and extent of Helton's union activities, the identities of other employees involved in union activities, and the extent of management's knowledge of these activities. On November 16, the state court denied the restaurant's request for a preliminary injunction. The suit for a permanent injunction and damages is still pending.

HELTON'S DISCHARGE

The Board found that the restaurant had violated sections 8(a)(1) and 8(a)(3), 29 U.S.C. § 158(a)(1) and (a)(3), by discharging Helton for engaging in union activity. The Board ordered reinstatement and back pay. Under section 8(a)(3), the test is whether the union activity was the moving cause behind the employee's discharge. *L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1341-42 (9th Cir. 1980). The determination of motive is particularly within the Board's area of expertise. *Pay'n Save Corp. v. NLRB*,

641 F.2d 697, 702 (9th Cir. 1981); *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 600 (9th Cir. 1979), *cert. denied*, 445 U.S. 915, 100 S.Ct. 1275, 63 L.Ed.2d 599 (1980). An employer may not use a business reason as a pretext for a discharge which is motivated by anti-union animus. *L'Eggs Products, Inc. v. NLRB*, 619 F.2d at 1341. The Board need not credit an employer's self-serving statement that an employee was discharged for cause. *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d at 600. If the Board's findings and inferences are reasonable and supported by substantial evidence, they must be affirmed. *Pay'n Save Corp. v. NLRB*, 641 F.2d at 702; *NLRB v. Silver Spur Casino*, 623 F.2d 571, 585 (9th Cir. 1980), *cert. denied*, 451 U.S. 906, 101 S.Ct. 1973, 68 L.Ed.2d 294 (1981).

In this case, the restaurant argues that it fired Helton for rules violations. The Board found that this reason was a pretext, and concluded that Helton was fired for engaging in union activity. This finding is supported by substantial evidence. Helton was a senior waitress, one of two waitresses who received a bonus. She had not previously been reprimanded for rules violations. Gay specifically told another breakfast waitress after the July 25 meeting that the rules did not apply to the breakfast shift, and none of the breakfast waitresses was required to call in on days off until Helton was fired. Other waitresses who broke the rules were reprimanded, not fired. The timing of Helton's discharge, the restaurant's leniency in enforcing rules violations of other waitresses, and the absence of reprimands on Helton's record all support the conclusion that she was fired for union activity. *See NLRB v. Warren L. Rose Castings, Inc.*, 587 F.2d 1005, 1008 (9th Cir. 1978).

The restaurant argues, however, that the evidence does not show that the restaurant management knew about Helton's union activities, and that without such knowledge, there can be no section 8(a)(3) violation. We conclude that there is substantial evidence to support the finding that the restaurant management knew about Helton's union activities. An employer's knowledge of union activity may be inferred from circumstantial evidence. *Famet, Inc. v. NLRB*, 490 F.2d 293, 295-96 (9th Cir. 1973). Because of the small number of employees who worked in the restaurant (40 waitresses total) and the close-knit, family management team, it is reasonable to infer that the management knew of Helton's efforts to organize a union. *Id.* After the July 25 meeting, the waitresses often discussed unionization in the restaurant. Their efforts at secrecy were minimal. At the August 3 party, Helton and another waitress discussed unionization in the presence of supervisor Gay. Later,

after Helton was fired, Gay told Dirkson that Helton had been fired for creating friction among the waitresses, and asked whether Helton had contacted any other waitresses. The Board's conclusion that Helton was fired for union activity was a reasonable one, and supported by substantial evidence. We enforce the order of the Board on this issue.

STATUS OF THE STRIKERS

The Board found that waitresses Nichols, Scott and Michaud struck to protest Helton's lawful discharge, and were therefore entitled to reinstatement. The restaurant argues that the waitresses did not strike, but quit their jobs. The Board found otherwise, and we conclude that its finding is supported by substantial evidence. The waitresses told manager Sturgeon that they had walked out of the restaurant because they objected to Helton's discharge and to management's treatment of the waitresses after the July 25 meeting. It was reasonable for the Board to conclude from this statement and the other evidence that the waitresses went on strike and picketed to protest the unlawful discharge of Helton. The failure of employees to present more specific demands to management at the time of their walkout does not prevent it from being a strike, within the scope of Section 7, 29 U.S.C. § 157. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14-15, 82 S.Ct. 1099, 1102-03, 8 L.Ed.2d 298 (1962); *Electromec Design & Development Co. v. NLRB*, 409 F.2d 631, 634 (9th Cir. 1969). It is true that during the conversation with Sturgeon, Scott said that she was tired of waitressing, and Nichols complained that her daily commute was too far. It is also true that the leaflets distributed by the picketers stated that the waitresses had quit their jobs in support of Helton. While different inferences may be drawn from the facts, however, the inferences drawn by the Board were reasonable and supported by substantial evidence. Once it was determined that the waitresses were striking to protest the unlawful discharge of Helton, they were entitled to reinstatement on the terms specified by the Board. *NLRB v. International Van Lines*, 409 U.S. 48, 50-51, 93 S.Ct. 74, 76, 34 L.Ed.2d 201 (1972). We therefore enforce the order of the Board on this issue.

THREATS AND INTERROGATION

The Board found that the restaurant had violated section 8(a)(1) by threatening and interrogating employees. An employer's interrogation of an employee violates section 8(a)(1) if, under all the

circumstances, the interrogation reasonably tends to restrain or interfere with the employee in the exercise of his or her protected § 7 rights. *Clear Pine Mouldings, Inc. v NLRB*, 632 F.2d 721, 725 (9th Cir. 1980), *cert. denied*, 451 U.S. 984, 101 S.Ct. 2317, 68 L.Ed.2d 841 (1981); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1080 (9th Cir. 1977). The test is whether the interrogation tends to be coercive, not whether the employee was in fact coerced. *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d at 725; *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359, 1364 (9th Cir. 1981). The Board found four instances of threats or interrogation which violated section 8(a)(1). The findings are supported by substantial evidence.

On the first day of picketing, manager Sturgeon threatened to get even with the picketers. That afternoon, president Gene Johnson told a picketer that she would hate to see him get hurt by all this. Both conversations involved threats which violated section 8(a)(1). On two occasions, supervisor Gay questioned Dirkson about union activities. On August 10, Gay told Dirkson that she had to fire Helton because Helton had been antagonizing the waitresses. Gay then asked whether any other waitresses had been contacted by Helton. A few days later, Gay again asked Dirkson whether any other waitresses had been talking about the union. Taken together, these two conversations clearly implied that a waitress involved in unionization would be fired. Therefore, these interrogations violated section 8(a)(1).

THE STATE COURT SUIT

The Board found that the restaurant had violated sections 8(a)(1) and 8(a)(4) by filing and prosecuting the state court civil suit against the picketers. It is clear that "the mere filing of a lawsuit can restrain the exercise of [section 7] rights." *United Stanford Employees, Local 680 v. NLRB*, 601 F.2d 980, 983 (9th Cir. 1979). Before condemning a lawsuit as an unfair labor practice, however, the Board must be careful to make an accommodation between the rights of all persons to seek resolution of their legal claims in court and the rights of employees under the NLRA. *Clyde Taylor*, 127 N.L.R.B. 103, 109 (1960). The Board has adopted the rule that it is not an unfair labor practice for an employer to file and prosecute a civil lawsuit against an employee, so long as the suit is filed in good faith and not in furtherance of an unlawful objective. *See United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d 1017, 1023 (4th Cir. 1981); *Power Systems, Inc. v. NLRB*, 601 F.2d 936,

939 (7th Cir. 1979). Thus an employer who brings a good faith action against employees for mass picketing, and produces evidence making his claim a colorable one, is not guilty of an unfair labor practice simply because he ultimately loses the lawsuit on the merits. *Cf. Associated General Contractors v. NLRB*, 637 F.2d 556, 560-62 (8th Cir. 1980).

In this case, the restaurant's civil lawsuit had a lawful objective on its face; *i.e.*, the complaint sought relief for alleged wrongs that the state court could remedy. The Board found, however, that the restaurant lacked a reasonable basis in fact for the lawsuit, and concluded that the lawsuit was filed in bad faith to retaliate against the picketers. The Board found violations of both section 8(a)(1) and section 8(a)(4). Other courts have stated that the employer's anti-union motive is a key element of such violations. *See Associated General Contractors v. NLRB*, 637 F.2d at 561; *United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d at 1024.[1] We conclude that there is substantial evidence in the record to support the Board's findings that the restaurant's lawsuit lacked a reasonable basis in fact, and that it was filed to penalize Helton for filing charges with the Board and to penalize the picketers for engaging in protected activity.

The restaurant produced no evidence to support its suit to enjoin the picketing. The allegations of mass picketing, trespass, and the resultant blocking of restaurant entrances and danger to the public were totally unsubstantiated. The state court did issue a temporary restraining order to limit the number of picketers and the manner of picketing. At no time, however, did the picketers number more than seven adults and two children who demonstrated peacefully on the sidewalk outside the restaurant. The mass picketing

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[1] We question whether motive should necessarily play a part in determining whether an employer violates section 8(a)(1) by filing a lawsuit, without a reasonable basis in fact, against an employee. On its face, section 8(a)(1) does not require a showing of motive: "It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7.]" In contrast, section 8(a)(4) requires a showing that the employer's conduct was provoked by the employee's filing of charges with the Board. Motive is therefore a necessary element of a section 8(a)(4) violation. Because we uphold the Board's finding of improper motive, we need not reach the question whether section 8(a)(1) may be violated in the absence of such motivation. *See Ad Art, Inc. v. NLRB*, 645 F.2d 669, 678 n.10 (9th Cir. 1981).

alleged in the complaint never materialized and the preliminary injunction was later denied.

The restaurant also lacked a reasonable basis in fact for its libel suit. To prove libel in the context of a labor dispute, an employer must prove that the employees made false, defamatory statements, and that the statements were made with "actual malice," as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 725-26, 11 L.Ed.2d 686 (1964). *See Linn v. Plant Guard Workers*, 383 U.S. 53, 65, 86 S.Ct. 657, 664, 15 L.Ed.2d 582 (1966). The statements contained in the leaflets were somewhat ambiguous; it was not made clear whether all the picketers' listed complaints (which the administrative law judge found to be factually true) had been made the subject of charges by the NLRB. The restaurant may therefore have believed that the leaflets falsely characterized the NLRB proceedings. But the very ambiguity of the leaflets in that regard tends to negate actual malice. In fact, the restaurant produced no evidence to show that the picketers made the statements with reckless disregard for the truth or falsity of the statements. Instead, the restaurant argues that its lawsuit had a reasonable basis because the complaint on its face was subject to state court jurisdiction. More than a carefully drawn complaint is required to avoid a finding that a lawsuit lacks a reasonable basis. *See United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d at 1024-25.

The lack of a reasonable basis in fact for the lawsuit is some evidence that it was filed for an improper purpose. The Board's finding of an improper motive is supported by more than this reasonable inference, however. On the first day of picketing, manager Sturgeon confronted the picketers, and wrote down their names. She told them that she would "get even with you for what you're doing." She told Helton that she would "get even with you if it's the last thing I do." That afternoon, president Gene Johnson told a picketer that she would hate to see him "get hurt by all this." Five days later, the restaurant filed the lawsuit in state court. The restaurant almost immediately deposed Helton, and questioned her in depth about the identities of other pro-union employees. The deposition was conducted without the assurances against reprisal usually expected to accompany employer interrogation of employees.[2]

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[2] The Board found that the restaurant violated section 8(a)(1) by conducting this deposition. The deposition almost certainly had a chilling effect on Helton and the other picketers. It also tended to interfere with the Board's administration of federal labor policy by allowing the restaurant to circumvent the restrictive discovery rules which apply to unfair labor practice hearings. *See NLRB v. Maxwell*,

These circumstances, in the context of other unfair labor practices which the Board found, clearly permit a finding that the lawsuit was prompted by an improper motive. The immediate effect of this lawsuit upon Helton was to penalize her for filing an unfair labor practice charge with the Board. That motive and effect clearly produce a violation of section 8(a)(4). In addition, the lawsuit carried an implicit message to the other picketers: namely, that any persons who file charges against the restaurant or picket the restaurant will find themselves in court.[3] The violation of section 8(a)(1) is also clear. We conclude that substantial evidence supports the Board's finding that the lawsuit filed by the restaurant against Helton and the other picketers violated sections 8(a)(1) and 8(a)(4). *See United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d at 1025.

Since the Board properly found that the filing of the state court action was an unfair labor practice, it follows that the Board can order the employer to cease and desist from that practice. The federal anti-injunction statute, 28 U.S.C. § 2283, does not prevent the Board from curbing state court action that interferes with the Board's exercise of its own jurisdiction. *Capital Service, Inc. v. NLRB*, 347 U.S. 501, 504-06, 74 S.Ct. 699, 701-03, 98 L.Ed. 887 (1954); *see also NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144-48, 92 S.Ct. 373, 377-79, 30 L.Ed.2d 328 (1971). Indeed, the Board's power to enforce the provisions of sections 8(a)(1) and 8(a)(4) would be largely crippled if it could not order the withdrawal of a retaliatory lawsuit.

It is true that the regulatory scheme established by the National Labor Relations Act does not of itself preempt state court jurisdiction over actions for libel arising in a labor context. *Linn v. Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). The

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637 F.2d 698, 702-03 (9th Cir. 1981). Because we agree that filing and conducting the libel suit was an unfair labor practice, however, we do not consider whether the deposition alone violated section 8(a)(1).

[3] The chilling effect of a state lawsuit upon activity protected by the Act is multiplied when the state action, as here, seeks large damages. Employees whose picketing is the subject of a state suit for injunction may default and simply comply with the terms of the state injunction. They can hardly afford to fail to defend a claim for $500,000 damages. *See Linn v. Plant Guard Workers*, 383 U.S. 53, 64, 86 S.Ct. 657, 663, 15 L.Ed.2d 582 (1966).

Supreme Court has recognized the potential of such state suits for interference with federally protected rights, however, and has consequently ruled that all state libel actions are preempted unless they are based upon defamatory statements published with knowledge of their falsity or with reckless disregard of truth or falsity. *Id.* at 65. This carefully drawn boundary between legitimate state and federal interests would be hopelessly obscured if a libel action was automatically sustainable so long as the plaintiff carefully drafted its complaint to allege malice. The proper test of the legitimacy of the state action is whether the plaintiff has evidence to support its allegations of malice. *See United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d at 2024-25.

The state court, of course, is competent to determine whether an employer who brings a libel suit has evidence to support his allegations. The same determination, however, is one which the Board must make to decide whether filing the libel suit was an unfair labor practice. Since the Board has actually decided the issue, and the subject is central to the enforcement of federal labor policy, the Board's decision would appear to preempt further action by the state court. *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 209-10, 98 S.Ct. 1745, 1763-64, 56 L.Ed.2d 209 (1978) (Blackmun, J., concurring); *see San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-245, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959). Whether or not the state court's jurisdiction is technically preempted, however, the Board has the power to enjoin a state court lawsuit when the impropriety of that lawsuit is properly addressed and adjudicated by the Board.

We recognize that this case involves a delicate balance between federal and state interests as well as between individual rights of organization and litigation. The Board has demonstrated its sensitivity to these issues by its sparing enforcement of limitations on the right to bring suit in state court. *See United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d at 1022-23. In the present case the employer did not offer factual substantiation of its allegations of malice, and substantial evidence supported the Board's finding that the action was brought for retaliation and intimidation of employees in their organizational rights. In these circumstances, pursuit of the state action threatened the proper enforcement of the federal act and the Board was justified in putting a stop to it.

The Order of the Board is enforced in its entirety.

Appendix A-14

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

[Caption deleted]

On September 27, 1979, Administrative Law Judge James S. Jenson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions and a brief in answer to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record[1] and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law

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[1] The Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Administrative Law Judge found, *inter alia*, that Respondent violated Sec. 8(a) (4) of the Act by Supervisor Sturgeon's threat to "get even" with employee Helton for her participation in picketing Respondent's restaurant, and by Gene Johnson's, Respondent's part owner, veiled threat of retaliation to Carl Nichols, the husband of employee Cheryl Nichols, for her picketing activities. While we agree with the Administrative Law Judge's findings that the threats were in retaliation for the employees' protected activities and thus unlawful, we find no evidence to support his conclusion that such conduct was in response to Helton's filing of an unfair labor practice charge. Accordingly, we do not adopt the Administrative Law Judge's findings of violations of Sec. 8(a) (4) with respect to these incidents, but, instead, find that the threats violated Sec. 8(a) (1) of the Act.

In his exceptions, the General Counsel notes that, while the Administrative Law Judge found that employees Nichols, Michaud, and Scott were unfair labor practice strikers, he failed to set forth in either his recommended Order or notice their rights respective to reinstatement and backpay. Accordingly, we shall amend his recommended Order to include such provisions.

[3] While the Administrative Law Judge found that Supervisor Gay interro-

Judge, except as modified herein, and to adopt his recommended Order, as modified below.

Amended Conclusions of Law

1. Substitute the following Conclusion of Law 3 for that of the Administrative Law Judge:

"3. By interrogating an employee on two separate occasions on and after August 10, 1978, regarding the union activities of other employees, Respondent engaged in unfair labor practices within the meaning of Section 8(a) (1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Bill Johnson's Restaurants, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(c):

"(c) Threatening to bring reprisals against employees or their spouses for picketing its premises or for engaging in other protected concerted activities."

2. Insert the following as paragraph 2 (d) and reletter the succeeding paragraphs accordingly:

"(d) Offer to employees Nichols, Scott, and Michaud, upon application, reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired on or after September 18, 1978, the commencement of the unfair labor practice strike."

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only refers to a single incident of interrogation in his Conclusions of Law. The General Counsel requests that the Conclusions of Law be amended to reflect that two interrogations, in fact, occurred. We agree, and shall amend the Administrative Law Judge's Conclusions of Law accordingly.

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. April 30, 1980

Howard Jenkins, Jr., Member

John A. Penello, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge employees because of their union or other protected concerted activities.

WE WILL NOT question any employees or former employees regarding their union activities or the union activities of others.

WE WILL NOT threaten to bring reprisals upon employees or their spouses for picketing our premises or for engaging in other protected concerted activities.

WE WILL NOT file a civil lawsuit against employees, or threaten to depose or depose them, for engaging in protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Myrland R. Helton immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and WE WILL reimburse her for any loss of earnings she may have suffered because we discharged her, together with interest.

WE WILL offer to employees Nichols, Scott, and Michaud, upon application, reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired on or after September 18, 1978, the commencement of the unfair labor practice strike.

WE WILL withdraw the complaint styled as Bill Johnson's Restaurants, Inc., An Arizona Corporation, *et al.* v.

Myrland R. Helton, *et al.*, No. C375470, which we caused to be instituted in the Superior Court of the State of Arizona in and for the County of Maricopa, and which we filed and maintained because Helton utilized the processes of the National Labor Relations Board, and WE WILL reimburse Myrland R. Helton and all other named party defendants for all legal expenses incurred in the defense of said lawsuit, including expenses incurred in relation to Defendants' Answer and Counterclaim.

BILL JOHNSON'S RESTAURANTS, INC.
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Second Floor, 3030 N. Central Avenue, Box 33069, Phoenix, Arizona 85067, Telephone 602-241-2362.

Appendix A-19

DECISION OF THE ADMINISTRATIVE LAW JUDGE

[Caption deleted]

Statement of the Case

JAMES S. JENSON, Administrative Law Judge: These cases were heard before me in Phoenix, Arizona on December 7, 8, 9 and 20, 1978,[1] based upon complaints issued by the Regional Director for Region 28 on September 20 and October 23 respectively, pursuant to charges filed by Myrland R. Helton on August 9 and September 26 respectively. The latter charge was amended on October 3, and the complaints, which were consolidated for hearing by order dated November 3, were both amended at the hearing. The complaints alleged, in substance, the unlawful discharge of four employees, unlawful interrogation, the threat to file and filing of a civil action against several employees, former employees and their respective spouses for engaging in picketing of Respondent's premises, and a threat to depose an alleged discriminatee. Respondent filed answers denying the commission of any unfair labor practices, contending the civil action which it filed in the Superior Court of Arizona, and the depositions taken pursuant to the Arizona rules of civil procedure, were lawful. All parties were afforded full opportunity to appear, to introduce evidence, and to examine and cross-examine witnesses. Extensive briefs were filed by the General Counsel and the Respondent and have been carefully considered.

Upon the entire record in the case,[2] and from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following:

Finding of Fact

I. Jurisdiction

The Respondent is engaged in the operation of restaurants in Phoenix and Mesa, Arizona. Its annual gross sales exceeds $500,000

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[1] All dates hereafter are in 1978 unless otherwise stated.

[2] The General Counsel's motion to correct the record is granted with the exception of the correction requested on page 701, line 6. Accordingly, the motion and the Respondent's opposition thereto are received in evidence as General Counsel's Exhibits 2(r) and (s) respectively.

and its annual purchases of goods and supplies which are delivered from suppliers located outside Arizona exceeds $10,000. The Respondent admits, and it is found that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Issues

Case No. 28-CA-4970

1. Whether Helton was discharged because of her union activities in violation of Section 8(a)(3) and (1) of the Act.

2. Whether, on August 10, Suzie Gay, interrogated an employee in violation of Section 8(a)(1) of the Act.

Case No. 28-CA-5041

1. Whether Nichols, Michaud and Scott were discharged because of their union or protected concerted activities in violation of Section 8(a)(3) and (1) of the Act.

2. Whether the picketing that commenced on September 20 was to protest the unfair labor practices alleged to have been committed in Case No. 28-CA-4970.

3. Whether Gene Johnson threatened to file a lawsuit against employees in retaliation for their union and protected concerted activities in violation of Section 8(a)(4) and (1) of the Act.

4. Whether the filing and prosecution of the civil action in the Superior Court of Arizona to enjoin the named defendants, who were employees, former employees and/or their spouses, from engaging in certain conduct was filed because Helton filed the charge in Case No. 28-CA-4970 and because the other named defendants engaged in protected concerted activities, in violation of Section 8(a)(4) and (1) of the Act.

5. Whether, by threatening to depose and by deposing employees, former employees and their spouses regarding the Union and concerted activities of employees, Respondent violated Section 8(a)(4) and (1) of the Act.

6. Whether Sherry Sturgeon threatened employees with reprisals because they engaged in protected concerted activities in violation of Section 8(a)(4) and (1) of the Act.

7. Whether Don Kalfas interrogated a former employee about said employee's union activities and the union activities of other of the Respondent's employees in violation of Section 8(a)(4) and (1) of the Act.

III. The Alleged Unfair Labor Practices

The Setting

The Respondent operates several restaurants in the Phoenix and Mesa, Arizona area. Only one of the restaurants is involved in these proceedings, herein called the Big Apple. The Respondent is operated by the Johnson family. Gene Johnson is the president and mother of vice presidents Johnny and Rudy Johnson, secretary-treasurer Dena Cameron and manager Sherry Sturgeon. Lois Williams, another manager, is the former wife of Rudy Johnson. Don Kalfus is the general manager, and Suzie Gay is the day supervisor. All of the foregoing, with the exception of Dena Cameron, are alleged and admitted to be supervisors. The record establishes that Dena Cameron is also a supervisor. Myrland R. Helton, the Charging Party, and an alleged discriminatee, worked for the Respondent at the Big Apple from February 2, 1972 until terminated on August 8. At the time she was discharged, Helton was the most senior waitress at the Big Apple and the only employee receiving a bonus which amounted to 20 cents an hour. Sandy Lambertus, who had been hired in 1964, voluntarily left the Respondent's employ on August 3. Lambertus was the only waitress besides Helton who was paid a bonus. Cheryl Nichols, Carla Scott and Dale Michaud, all alleged as discriminatees by amendment to the consolidated complaint during the trial, were also waitresses at the Big Apple until September 18.

A. *Case No. 28-CA-4970*

1. Helton's Discharge

As previously noted, Helton commenced working for the Respondent in February 1972, and at the time of her discharge on August 8, was one of three regular waitresses on the breakfast shift, whose hours were 6 a.m. until 2 p.m. An overlapping shift of approximately 13 employees worked from 10 a.m. until 6 p.m. Because of the size of tips and other amenities, the breakfast shift

was considered the most desirable. Gay supervised the waitresses on those shifts.

The record shows that the waitresses first discussed the Union among themselves in about 1975. Efforts towards organizing a union, however, were not undertaken until after Johnny Johnson held a meeting of all employees on July 25, at which time he told the employees, *inter alia,* that he didn't want them to stand around talking, but instead to keep busy at all times; that they should go to the back if they wanted a drink; that they should not sit together when they ate; that they should write customers' checks starting on the top line; that they weren't to sit with customers; that they should leave the premises as soon as work was finished and not return on days off unless to eat; that they weren't to go into the kitchen or behind the fountain; that they weren't go go to the lounge except to put on lipstick and freshen up; that the waitresses should call in on "call days," as before; and that they weren't supposed to chew gum or use the company telephone for personal calls. Hardly a master at diplomacy, he went on to state that if the employees didn't follow those policies, they would be fired, in which case they would never get another job in one of the Respondent's restaurants and that he would make it hard for them to get a job at any other restaurant; that the waitresses "didn't really mean anything" and that he could replace them all within half an hour; that he could discharge them for the earrings they wore; and that they weren't worth a dime a dozen.[3] Lambertus did not attend the meeting since she had given notice she was quitting Respondent's employ on August 3. Nevertheless, she credibly testified that after the meeting she asked Gay what had transpired and was told that nothing pertained to the breakfast girls.

Feeling insecure in their jobs following the meeting, the waitresses discussed among themselves the unfair treatment they felt they were receiving, and Helton suggested they either organize a union or get one to represent them. One of the waitresses, Carla Scott, suggested that Helton draft a list of grievances for presentation to an attorney. On July 28, Helton, Cheryl Nichols, Dale Michaud (herein Nichols and Michaud) and Terry Curry, all waitresses, were discussing employee problems in the employees lounge, and Helton said she thought they needed union representation. Feeling it was

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[3] Based upon the mutually corroborative testimony of Helton, Lois Dirkson, Dale Michaud, Cheryl Nichols and Carla Scott. Johnny Johnson did not testify.

too risky to discuss the matter while working, they agreed to meet later at the Ramada Inn located nearby. Later in the day, a customer commented to Helton that the waitresses needed a union and agreed to have a union organizer contact her.[3] Later that day, at the Ramada Inn, Helton told the other waitresses that arrangements had been made for a union organizer to contact them.

At about 11:30 a.m. on August 3, Helton, Michaud and Lambertus were discussing the Union when Gay approached them on another subject. During the afternoon, a going-away party was held in honor of Lambertus who was going to join her husband in the trucking business. Lambertus' husband was present, and talked to Helton, Gay and his wife about the Teamsters Union and its benefits, to which Helton remarked "that's what we need here is a good union." The July 25 meeting was also discussed, as were pension and profit sharing plans. Gay mentioned that she had raised the subject of profit sharing at a managers meeting, but that it hadn't been well received. Lambertus remarked that the trouble with going to the Union was that she didn't think the waitresses would stick together, and Helton responded that she felt they would "this time."[4] Gay and Helton were sitting beside each other and Lambertus was across the table. Lambertus, whom I credit, testified that she was concerned Helton would be fired because of the organizing, so that after the party she told Gay she hated to leave Helton, and that Gay responded that "She would take care of her. Because she was her friend, too . . . ."

On August 4, Helton sought to dissuade Penny Toms, who had been on vacation and had not attended the July 25 meeting, but who had been informed about it that morning by other waitresses, from quitting her job because they were organizing a union so there would be better working conditions and higher pay. Toms responded that it would never happen because Johnny Johnson had told her a couple of years previous that he "would not allow a union in his place." That same day, the customer who had earlier agreed to have a union organizer contact Helton at the restaurant, told her that the organizer had been out of town but that he would contact her on his return. When Helton impressed him with the urgency of the matter, the customer told her that all she had to do was call the National Labor Relations Board, who would tell her what to do.

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[4] Based on credited testimony of Helton and Lambertus. Gay's denial that the Union was mentioned is not credited.

Helton took out her checkpad and wrote "NLRB" and the phone number of the Regional Office on the cardboard backing. Lois Dirkson, a hostess-cashier, saw the notation, made a comment to Helton about it and indicated she thought it unwise for Helton to be walking around the restaurant with that written on her checkpad.[5] While Gay denied she had seen the notation on Helton's checkpad, she acknowledged that sometimes the cardboard backing is wrapped around the checkstubs when it is turned in to the cashier after the pad is empty, that she has access to them and had "NLRB" been written on one, she would have noticed it. When a pad is not completely used up at the end of a waitress' shift, it is placed on a shelf in the employees lounge with the binding, which contains the waitress' name, facing out. Helton testified without contradiction that she turned in the used pad with the backing attached as a matter of practice.

Helton didn't work on August 6 or 7, but on Tuesday, August 8, worked her regular 6 a.m. to 2 p.m. shift.[6] While nothing was mentioned during work regarding her tenure, at about 3 p.m. that afternoon Gay called her at home and informed her that they had found a replacement for her[7] and that she was terminated, according to Helton, because Johnny Johnson didn't like something she had said at the July 25 meeting[8] and because of her attitude, which was not explained.[9] Helton asked if she could have a slip with her paycheck explaining why she was being fired, and Gay responded negatively, that the Respondent wasn't required by law to give her one.

On the day following her discharge, August 9, Helton filed the charge in Case No. 28-CA-4970.

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[5] Dirkson testified without contradiction that Gay had told her that she could stay in her office during the morning shift and always know what was going on because she had people on the floor that would inform her.

[6] Payday is every other Monday.

[7] On cross-examination Gay admitted the fact she may have believed Helton was going to quit on October 1 had nothing to do with her termination. Further, a replacement did not commence working until a week after the discharge.

[8] Helton had asked a question about serving only one pancake to a customer.

[9] Helton had told Gay that she was going to look for another job but would remain until at least October 1st. October, it appears, is the commencement of the busy season.

Respondent claims Helton was discharged for refusing to abide by restaurant rules, gum chewing, use of the business phone for personal calls and failure to call in on a designated day off. While Gay testified she advised Helton of those reasons at the time she discharged her, Helton claimed otherwise. The evidence below convinces me Helton was telling the truth and Gay was not. Accordingly, I credit Helton. As a further reason for her termination, Respondent now claims Helton was insubordinate and disrespectful towards management. The evidence convinces me that it was not until after Helton had been discharged and filed a charge, that Gay went in search of reasons which might justify a lawful discharge. In this regard, the same day Respondent received a copy of the charge filed in this case by Helton, Gay questioned Dirkson about whether Johnny Johnson had said anything about gum chewing at the July 25 meeting. While Dirkson wasn't able to read what Gay had written on a legal pad she had with her, I am convinced Gay was in the process of compiling a list or reasons to justify Helton's earlier termination.

Gay's claim that Helton was terminated for the reasons stated does not ring true. While she testified one of the reasons was Helton's habit of gum chewing, which continued after the July 25 meeting, it is clear that other waitresses chewed gum after that date with no adverse effect upon their employment status. In this regard, Janet Wolff, a witness called to testify by Respondent, testified that after the July 25 meeting, she observed Helton with whom she worked 3 or 4 hours a day, chewing gum "pretty frequent. Almost every day." She went on to testify that she worked with five or six waitresses and that five or six waitresses chewed gum; that while "I don't chew gum that often myself," — she also denied chewing gum — the other girls still do, yet none has been discharged for that reason. Tidey, whose bias against Helton was obvious throughout his testimony, claimed he had observed Helton chewing gum on specific dates, July 26 and 27, and that he reported it to Gay. He admitted that since July 25 he had seen a number of the waitresses chewing gum, yet none was terminated. Tidey also alluded to the fact that in April an inspector from the County Health Department had "pointed out there was a few girls on the floor that was chewing gum and . . . it was unsanitary." According to Tidey's testimony, Helton was the only waitress to whom he spoke about the matter. It is clear from the record that chewing gum is not a violation of the Health Department Code, and no mention was made of such an alleged violation in the inspector's report. Tidey sought to add a further reason for terminating Helton by claiming she caused prob-

lems with the cooks by asking for extra food portions for customers and by ordering omelets with onions, although cooking onions on the grill is against company policy because it causes other items to have an onion taste. He acknowledged that the simple answer to a special order for an omelet with onions was to refuse to prepare it. Moreover, many waitresses have requested special orders and many have asked for extra food portions for customers. In fact, adding more to an order is justified when the cook hasn't put enough on the plate initially. To his knowledge, asking for an order containing onions never entered into a decision to discharge anyone.[10]

Gay testified she also found fault with the fact Helton failed to call in on "call days."[11] Respondent does not dispute the fact that the breakfast shift waitresses were not required to call in on "call days" prior to the July 25 meeting. Gay testified that after the meeting she specifically told Helton "Don't forget to call in." However, according to her, Helton was the only one she told to do so. Which raises the question: Why Helton? The most senior employee, Lambertus, was never required to "call in" on an off day, and she credibly testified that while she didn't attend the July 25 meeting, she asked Gay what had transpired and was told that "nothing pertained to the breakfast girls . . . " Not until September, a month after Helton's discharge, was Michaud, on the breakfast shift since sometime in July, told that she had to call in. Cheryl Nichols credibly testified that she also never called in on her off days when she worked the breakfast shift, nor did Penny Toms. In fact Toms testified that no one she knew who worked the breakfast shift was required to call in. Further, Carla Scott credibly testified that while she started on the breakfast shift about August 1, it wasn't until after Helton was terminated that the breakfast shift waitresses were told they had to call in. Dirkson's testimony confirms that fact.

Another reason Gay asserts led to Helton's termination was her use of the Respondent's business phone for personal calls. Gay admitted that prior to the July 25 meeting she let the waitresses use

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[10] Respondent apparently finds fault with the fact Helton may have asked for substitutions on the menu. It is clear, however, that requesting substitutions was not unique with Helton, but, according to Sturgeon, is a recurring problem.

[11] Waitresses, except for those on the breakfast shift, were required to call in on one specific day off to see if they were needed.

the business phone.[12] She testified that Helton worked on her shift over 6 working days between July 25 and the date of her discharge, and that on each day Helton used the business phone without permission in order to awaken her husband at 7 a.m., as she had done in the past. She "thought" she mentioned her using the phone after July 25, but didn't say anything on the other occasions. Helton, on the other hand, testified that she had used the business phone after July 25 on three or four occasions to awaken her husband and on another occasion to tell him to pick her up from work at a later hour. She testified she had obtained Gay's permission on each occasion, and that a couple of days after the July 25 meeting Gay told her that she and Lambertus could use the business phone. Dirkson testified that she had overheard Gay tell Helton to use the business phone rather than spend her money on the pay phone, and that Gay had told her, when she first started working, that Helton and Lambertus were permitted to use the business phone. Of further significance is the fact that Gay told Lambertus that nothing that was said at the July 25 meeting pertained to the breakfast waitresses.

Respondent contends another factor leading to Helton's discharge was her insubordination and disrespectful attitude toward management. Examples of offensive conduct, argues the Respondent, involved arguments with a fountain employee, James Sanford; Helton's conduct regarding a day off on her birthday; her insistence on extra portions for customers and special orders for herself (previously covered herein); and a purported statement to the effect she would like to put the Johnsons, with the exception of Gene, in a jar and screw the lid on and watch them die. With respect to the alleged offensive conduct involving Sanford in April, I find it significant that Sanford was terminated on April 20,[13] leading me to conclude that long-term employee Helton was not the transgressor. In any event, even if she and Sanford had differences, Gay testified they were both sent back to work. The statement regarding the placement of the Johnsons, with the exception of Gene, in a jar and let them die, purportedly was made by Helton at the August 3 going-away party for Lambertus, and in her presence. Helton specifically denied making the statement, and her testimony is corroborated by Lambertus. Accordingly, I do not credit Gay's testimony that Helton ever made such a statement.

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[12] Pay phones located in the restaurant were available to the waitresses.

[13] Respondent's Exhibit No. 7.

Sturgeon testified that she always had trouble with Helton and had talked to Gene Johnson over a 2-year period about terminating her. According to her, Helton had worked for Respondent so long she didn't feel she had to follow the policies.[14] Contrary to Sturgeon, Gay apparently had no complaint about Helton's following company policies until sometime after the July 25 meeting. Which, since Gay was more closely in contact with Helton than Sturgeon, casts doubt on Sturgeon's testimony. Moreover, I find it unlikely, indeed incredible, that Helton would have been one of only two employees receiving a bonus up until the time of her discharge if she had been the poor employee the Respondent's witnesses characterize her.[15] Of further significance in assessing the Respondent's reasons for terminating Helton is the fact that Respondent's supervisors expressed union animus, specifically when Johnny Johnson told Toms he would never allow a union in his place; when Gay, on numerous occasions, told employees that the words "union and sue" were two words that employees weren't permitted to use, and that one could be fired for saying them. I also find it significant that Helton, at the time of her discharge, was the most senior waitress and, as noted, the only one receiving a bonus at that time; that she had never been reprimanded, and that Gay had told Dirkson that she knew what was going on because she had an informer on the floor.

Paragraphs 7, 8 and 9 of the complaint in Case No. 28-CA-4970, allege that Helton was discharged on August 8 because she engaged in union and other concerted activities. The principal question then is whether the Respondent, in discharging employee Helton on August 8, was motivated at least in part by antiunion animus. It is settled law that the Board "is not compelled to accept" the employer's stated reason an employee was discharged "when there is reasonable cause for believing that the ground put forward by the employer was not the true one and the real reason was the employer's dissatisfaction with the employee's union activity." *Great Atlantic and Pacific Tea Co.* v. *N.L.R.B.*, 354 F.2d 707, 709 (C.A. 5, 1966). "And, a discharge motivated only in part by antiunion discrimination is similarly illegal." *J. P. Stevens & Co.* v. *N.L.R.B.*, 380 F.2d 292, 300 (C.A. 2, 1967), cert. denied, 389 U.S. 1005.

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[14] Sturgeon also testified that when Helton learned she was scheduled to work on her birthday in May, she cried, and consequently Sturgeon told her to go home.

[15] Lambertus was the only other employee to receive a bonus.

Based on the foregoing, I find that Respondent's decision to discharge Helton on August 8 was not motivated by any of the several reasons advanced by the Respondent. I am convinced that the motivating force in Respondent's action was its desire to eliminate a known union adherent. In the circumstances of this case, such an inference seems appropriate under the rationale of the Court in *Shattuck Denn Mining Corp.* v. *N.L.R.B.*, 362 F.2d 466, 470 (C.A. 9, 1966): "Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. Nor is the trier of fact . . . required to be any more naif than is a judge. If he finds the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal — an unlawful motive — at least where . . . the surrounding facts tend to reinforce that inference . . . " Here, the "surrounding facts" preponderate in favor of a finding that the Respondent, in discharging Helton, was motivated by its knowledge that she was a union adherent, and that the reasons advanced by the Respondent are false. Accordingly, by engaging in such conduct, the Respondent violated Section 8(a)(3) and (1) of the Act.

2. Interrogation by Gay

Paragraph 9(b) alleges that on or about August 10, Gay interrogated an employee about the activities of Helton and other employees.

Dirkson testified that the day after Helton's discharge, she had the following conversation with Gay:

> I said, I'm going to say what I have to say about Ruth's discharge now. And, then, we'll let it go, and I said, — she said, are the girls on the floor blaming me? And, I said, everybody thinks that Ruth got a raw deal. And, she said, I had to do it. She said, Ruth had been antagonizing the girls on the floor. She said, I can't run a shift with that type of friction. She said, I've been sick for three (3) days, knowing that I had to discharge Ruth, but when Johnny Johnson tells you to fire somebody, as a part of my job, I do it. And, then she asked me if I knew Ruth had any contact with any of the girls and I said, no. That's all of the conversation that I recall.

She testified that a day or two after the letter arrived from the Board advising that Helton had filed a charge, Gay "asked me if I knew if there were any waitresses that had been talking about the Union." The Respondent argues that since the conversations related above occurred on the floor of the restaurant and not in a private office; were two-party discussions between friends and Gay's demeanor or manner was not threatening; that since Gay didn't press the inquiry; that there is no evidence Dirkson felt restrained or threatened; and since they comprised an isolated incident, a violation of Section 8(a)(1) should not be found. In the context of the entire case, these conversations indicate to me an attempt on the part of Gay to determine the full extent of Helton's union activities, and whether any of the other waitresses were also involved. These are classic examples of unlawful interrogation which require no recitation of authority.

B. *Case No. 28-CA-5041*

1. Alleged Discharge of Nichols, Michaud and Scott

The complaint alleges that on or about September 18, Nichols, Michaud and Scott ceased work concertedly and went out on strike in protest over Helton's discharge, and that Respondent discharged them for engaging in such activity.[16] The Respondent contends these three employees voluntarily quit their employment. The record shows that at approximately 11 a.m. on September 18, these three waitresses turned in their customer checkpads to the cashier and walked out of the Restaurant without giving anyone an explanation. Upon checking the checkpads, it was noted that Scott had written on hers "End of this place, 9/18/78, CAR."[17] The fact the three had left was reported to Lois Williams, who, with Sherry Sturgeon, observed the three drive away. About 2:30 that afternoon, they returned in order to make out and sign "tip slips" in order to get paid.[18] When they walked in, Williams told them they could pick

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[16] The allegation the three were discharged was added by amendment during the trial.

[17] "CAR" indicates Carla Scott.

[18] Payday is every other Monday and tip slips are made out on the Monday or Tuesday preceding the next payday. Regular payday was to have been September 25.

up their checks in the office which is at another Phoenix location. Sturgeon then asked the three to sit down in a booth and explain to her why they had "walked out." They responded that they didn't believe the way Helton had been fired was right, and that they didn't like the treatment they had received at the hands of Johnny Johnson since the July 25 meeting. After they had explained what had happened at the July 25 meeting, Sturgeon indicated that she hadn't been aware of what had taken place on that date, and that now that she was back things were going to change. According to Williams, Scott stated that she was trying to get out of waitressing and would like to get into something else like office work, and Nichols stated she was tired of driving all the way from Sun City where her husband worked and that she had heard that Kalfas was coming back and she refused to work with him. Williams indicated that if Nichols had asked for a transfer to the "west-side store," she was sure they could have arranged it. According to Williams, Michaud didn't say anything.

The General Counsel contends the three women walked out on strike on September 18 in protest over Helton's discharge which they believed to have been for union activities, and that they were discharged that afternoon as evidenced by the issuance of paychecks. The Respondent contends they quit their employment, and that the issuance of the checks immediately was to avoid any problem in light of a statute requiring that "When an employee quits the service, or is discharged therefrom, he shall be paid wages due him *at once*" (emphasis supplied). While it may well have been, as the Respondent argues, that the waitresses may have wanted to, and in fact intended at some time to quit their employment with the Respondent, I am satisfied that on September 18 they walked out in protest over Helton's discharge and in protest over the July 25 meeting, but that they did not quit their employment. Nor do I believe they were terminated by the Respondent. In view of the statute set forth above, I am unable to attach the significance the General Counsel does to the issuance of the checks on the same day the women walked out, and it may well have been that Williams and Sturgeon believed they had quit when they walked out without any prior notice. Further, I note that upon their return to the restaurant, they were invited to explain why they had walked out, and upon learning that one of the problems involved Johnny Johnson and the rules laid down at the July 25 meeting, Sturgeon, in what I conclude was a conciliatory move, stated that she hadn't been aware of what happened at that meeting, but that now that she was back, things would change. I note further that none of the waitresses stated they had quit, and

while they may have believed they would be terminated for having walked out, they were not told at any time that they were in fact terminated. I conclude on this evidence that on September 18, Nichols, Scott and Michaud ceased work concertedly and went out on strike in protest of the discharge of Helton, as alleged in Paragraph 8(a) of the amended complaint, and in protest over Johnny Johnson and conditions following the July 25 meeting. Contrary to the allegation in Paragraph 8(b), however, I do not find that they were discharged, and therefore recommend dismissal of Paragraph 8(b).

2. Picketing and Alleged Threats

The complaint in Case No. 28-CA-4970 issued on September 20 alleging Helton's discharge on August 8 for union or other concerted activities. On that same date Helton and her husband, Nichols and her husband, Scott, Michaud, and former employee Debra Mackie[19] picketed the Big Apple with a number of signs critical of the restaurant and its management, asking that it be boycotted and stating that it had been accused of engaging in unfair labor practices. Upon observing the pickets walking back and forth across the driveway and talking to those entering, Sturgeon called Rudy Johnson at home and told him what was going on. Rudy, who watched the picketing from the time he arrived at the restaurant until he left, called the police who apparently advised the pickets of their rights. In the meantime, Sturgeon, who admitted she was mad and used profane language in speaking with the pickets, came out to the picket line. Helton testified as follows concerning the conversation that took place:

> A. . . . Sherry came out and said don't block my fuckin driveways and we said we're not blocking your driveways and she said, and get the fuck off my property. And, I said I'm not on your property, but if it will make you happy, you know, we've been walking across the driveways, not stopping and then walking back, and I said, if it will make you happy we'll stay right here in front and not cross the driveways. And, she said, you might think you're funny, but I intend to have the last laugh. And, she said, I will get even with you for what you're doing to us. And, I said, don't threaten us, Sherry. And then, she walked

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[19] Mrs. Mackie's name also appears herein as Mackey and Makey.

> across and she had a paper and she said to Debby Makey, who the hell are you. And Debby said, I'm Debby Makey, I used to work here. And then she said to Dale, and who are you. And, Dale told her her name and she said, you're going to all pay for this. And, she said, and Debby, you and Dale as my witness, Ruth I'll get even with you if it's the last thing I do. And I do intend to have the last laugh. And, I just told her don't threaten us again. And, she started back across the parking lot. And, she stopped about half way across and looked back, and she said, is these your right names, I think is what she said. And, I said yeah, and there's some more coming down, do you want their names too. And, she said, no this will be enough. And, then she went on inside.
>
> Q. Were you laughing at the time?
> A. No, I wasn't laughing. I was scared.

Sturgeon's account of the conversation was "I told them they could picket all they wanted too, just to say — don't block the driveway. They started moving out of the driveway in front of the building on the sidewalk. And, Ruth [Helton] was holding that sign out, sort of waving it back and forth, like some horse in a parade grinning from ear to ear. And, it made me mad. And, I told her she thought she was so funny, we would see who would have the last laugh." Helton's testimony, corroborated in material part by Michaud, is credited over the more limited Sturgeon version. As it is clear on this record that the picketing being conducted was a protected concerted activity, it is equally clear that Sturgeon's threat to get even with Helton for engaging in such activity violated Section 8(a)(4) and (1) of the Act as alleged in Paragraph 13 of the amended complaint.

Carl Nichols testified that he received a telephone call at home that afternoon from Gene Johnson. The substance of his testimony was that Gene asked why he and his wife Cheryl had been picketing; that he told her in protest over Helton's termination and that the waitresses were upset with some of the things Johnny Johnson had said at the July 25 meeting; that Gene replied that she would hate to see the Nichols lose the new home they had bought; and that on two occasions during the conversation "she said that she would hate to see us get hurt by all of this." Gene Johnson admitted making the call to Carl Nichols and that its purpose was to reassure him that Cheryl had not been terminated. She denied she said anything about anyone losing a new home or getting hurt by what had hap-

pened. While in many instances it is difficult to determine which of two witnesses is telling the truth in one-on-one conversations, I entertain no doubt in this case. Carl Nichols impressed me as honest witness making a conscientious effort to tell the truth. Gene Johnson, on the other hand, left a distinct impression that she had memorized a story. In this regard, I find it incredible that she would not have personally assured Cheryl, who had answered the phone and was the purported subject of the conversation, that she was not terminated, instead of calling her husband to the phone in order to make what I find to be a veiled threat for having engaged in the picketing. I conclude that her threat was but an extension of Sturgeon's threat to get even for engaging in the same conduct, and that both instances of threats were designed to persuade the picketers to cease their lawful activities, and ultimately culminated in the filing of the civil suit discussed hereafter. Accordingly, I find that by making such veiled threat, the Respondent violated Section 8(a)(4) and (1) of the Act as alleged in Paragraph 15(b) of the amended complaint.

3. Respondent's Civil Action

Picketing continued on September 21 and 22 by substantially the same individuals. On the latter date, and again on September 26, the pickets distributed the following leaflet:

> THE NATIONAL LABOR RELATIONS BOARD HAS ISSUED A COMPLAINT AGAINST THE BIG APPLE RESTAURANT, 3757 E. VAN BUREN STREET, FOR UNFAIR LABOR PRACTICES.
>
> The complaint was issued as a result of charges filed by Myrland Helton, a former employee who was fired August 8 after suggesting to other waitresses they should organize a union. Mrs. Helton had been an employee of the Big Apple seven and one half years.
>
> Several other waitresses have quit their jobs to join Mrs. Helton in picketing the restaurant to inform the public of the dispute between the employees and the restaurant's management. Among the waitresses' complaints are the following:
>
> - Eight hour shifts with no specified breaks.
> - No pay for overtime when waitresses were required to remain at their posts until their last customer's check had been paid.

- Waitresses threatened with dismissal if they lost any time due to illness over the Christmas holiday season.
- Inconsistent management practices.
- Unwarranted sexual advances.
- A filthy restroom for women employees, with no soap, paper towels or toilet tissue provided.

EMPLOYEES OF BILL JOHNSON'S BIG APPLE FOR JUSTICE ON THE JOB.

On September 25, the attorneys for Respondent filed a complaint in the Superior Court of the State of Arizona, alleging, *inter alia*, that the pickets had engaged in mass picketing and harassment, published libelous statements in the above leaflet, and created a threat to public safety. For the purposes of the instant proceeding, the thrust of the state action is that "the leaflets contained false and outrageous statements, including misrepresentations of proceedings pending before the National Labor Relations Board and accusations that the Restaurant's waitresses had complained about 'unwarranted sexual advances' and about a filthy restroom for women employees, with no soap, paper towels or toilet tissue provided." The complaint sought monetary damages in the amount of $500,000, a temporary restraining order, other injunctive relief enjoining the defendants from trespassing, mass picketing, interfering with its business operations, engaging in acts or threats of violence, harassment or intimidation of any kind and "publishing false and misleading statements concerning plaintiffs' business, officers, agents, employees, facilities or practices, including but not limited to allegations misrepresenting the nature or substance of the matter now pending before the National Labor Relations Board in Case No. 28-CA-4970."[20] On the same day Respondent filed its state court action, it distributed a letter to its employees claiming Helton had filed a charge in Case No. 28-CA-4970 in bad faith and appealing to the employees to reject attempts to organize them. Two days later it

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[20] Named as defendants were Myrland and John Helton, Barbara and Lawrence Orr, Cheryl and Carl Nichols, Carla Scott, Debra Mackie, Dale Michaud and Jane and John Does, I through X respectively. In addition to the corporate Respondent herein, named as plaintiffs were Johnny and Rudy Johnson and Don Kalfus.

distributed a second letter appealing to employees to reject organization efforts.

Helton's testimony that she had told Gay about both an unwarranted sexual advance toward her and that the women's restroom was filthy, the latter remark having been overheard by Gene Johnson, was not refuted in the hearing before me. Also, testimony of sexual advances by Johnny Johnson and Kalfus toward Helton, Scott, Cheryl Nichols and Lambertus were not denied.[21] The testimony of the General Counsel's witnesses, corroborated in part by Gene and Rudy Johnson, and the Respondent's stipulation concerning "inconsistent management practices" establish the truthfulness of the seven other "waitresses' complaints" listed in the leaflet.

Respondent also filed with the state court a motion to shorten the statutory time for taking depositions and requesting they be taken on September 27 and 29 or October 2 and 3 if more convenient to the witnesses. Notices of taking depositions on September 27 and 29 were served on the defendants, the Heltons' to be taken on September 27 and the other defendants on September 29. The hearing on the temporary restraining order was held at noon on September 25. Helton was not informed of the complaint or hearing on the temporary restraining order until she received a telephone call from Katz, Respondent's attorney, less than an hour before the matter was scheduled to be heard.[22] Katz informed her of the hearing at noon, that she and her husband were defendants, and read her the names of the other defendants. Helton responded that Katz shouldn't be scaring the others, to which Katz replied "Aren't you," and Helton responded negatively. She testified that while she was unable to attend the hearing at noon because of the short notice, her husband did. The Court issued a T.R.O. granting substantially all of the relief requested, and set October 5 as a hearing date on the request for a temporary injunction.

On September 26, the Heltons, and later all of the defendants in the state court proceedings, hired attorney Michael J. Keenan to represent them. In a discussion with Keenan on September 27, Katz expressed his intent to question Helton regarding the facts relied

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[21] See transcript pages 879-883, 822, 830-831, 837.

[22] Katz had apparently called Scott a few minutes earlier, who had in turn called Helton right before Katz called her. The evidence does not disclose that any of the other defendants in the state matter were notified.

upon in determining that she had been fired for union activity, and indicated he may not need to take any depositions other than Helton's. In a second telephone conversation with Keenan, Katz outlined questions he proposed to ask Helton which centered around the facts she relied on in making the statement in the leaflet that she had been discharged because of her union activities. On September 28 Keenan's law firm filed in the state court a motion for protective order seeking to limit the scope of the deposition examination to preclude Respondent herein from obtaining discovery of matters covered in the complaint in Case No. 28-CA-4970, on the ground it was privileged under *N.L.R.B.* v. *Robbins Tire and Rubber Company*, 434 U.S. 1061 (1978). The Court denied the motion for protective order and initially ruled that ". . . the allegations regarding union organizing and the statements made to any investigators in that case [28-CA-4970] may not be inquired into." Katz, seeking clarification of the order, went on to argue that since the leaflet publicly accused the Respondent of discharging Helton because of her union activities, and since she knew the statement to be false, Helton had maliciously libeled the Respondent, therefore entitling it "to defend and protect our reputation by asking the facts, why she made the statements to a public agency as opposed to some other forum." In a partial reversal of her previous ruling, the Court ruled that while questions about statements made to NLRB investigators would not be proper, the Respondent could ask questions "regarding the statements made publicly in Maricopa County, and the basis for those statements."

In taking the depositions of Helton and the other defendants in the state court proceeding, Respondent's counsel directed numerous questions toward the nature and extent of Helton's union activities and the activities of other employees, supervisory knowledge of those activities and the Respondent's antiunion animus. Numerous questions were also asked of some of those witnesses regarding call days, use of the company phone for personal reasons and gum chewing, all matters relating to the Respondent's defense in the instant unfair labor practice proceeding.[23]

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[23] The depositions of Barbara and Lawrence Orr were taken on September 29; of Myrland R. and John Helton on October 2; of Carl and Cheryl Nichol and Dale Michaud on November 10. In preparation of his defense to the state court action, the Defendant's attorney took the depositions of Johnny and Rudy Johnson, Kalfus and Gay.

On the evening after Helton's deposition, Kalfus called Lambertus at home. He told her that her name had been mentioned several times during Helton's deposition, that he felt Helton had gotten a "bad deal," and that "he wanted to know if Suzie [Gay] was aware that the girls were trying to organize a union." After she responded affirmatively, Kalfus replied "Oh no," that he had hoped she would tell him differently. Lambertus called Helton and told her of the conversation. As alleged in paragraph 15(a) of the complaint, such interrogations violate Section 8(a)(1) of the Act. As it could reasonably be expected that Lambertus would tell Helton of the conversation, as she did, the question has its nexus in the taking of the deposition resulting from the filing of the state proceeding, which I find unlawful hereafter, and consequently the interrogation also violates Section 8(a)(4) of the Act.

On November 16, the state court denied the Respondent's request for a preliminary injunction and dissolved the T.R.O. Still pending before the state court is the Respondent's request for a permanent injunction and damages, and a defendant's counterclaim against the Respondent for abuse of process, malicious prosecution and wrongfully securing an injunction.

Positions of the Parties and Conclusions

1. The Civil Suit

Acknowledging the general rule expressed in *Clyde Taylor, Inc.*, 127 NLRB 103 (1960), that generally, the filing of a civil suit does not constitute an unfair labor practice, the General Counsel argues that where the lawsuit is in furtherance of an unlawful objective, as here, the Board will find a violation. The General Counsel relies chiefly on *Power Systems, Inc..*, 239 NLRB No. 56, enfd. denied ___ F.2d ___ , (C.A. 7, decided July 18, 1979).

The Respondent relies on a line of cases following *Clyde Taylor*, and the more recent case of *S.E. Nichols Marcy Corp.*, 229 NLRB 75 (1977), where the Board reversed an Administrative Law Judge who had found the Respondent violated Section 8(a)(1) by instituting a slander action against an employee, seeking $50,000 in damages. The Respondent argues that *Power Systems* is readily distinguishable on its facts in that the employer in that case originally sought monetary damages and an order enjoining the employee "from filing cases against Respondent with the courts and administrative agencies of the United States Government and the several states of the United States."[1] Here, argues the Respondent, it did not institute the state court proceeding to challenge the employees'

right to file a charge with the Board; instead, the suit challenges the right of employees to make defamatory accusations and to engage in mass picketing, when such conduct interferes with and damages the Respondent's business operations and reputation and threatens the public safety. Unlike *Power Systems*, it argues, the Respondent's suit does not seek to enjoin or restrain access to the Board, or to recover compensation for damages suffered due to employee resort to the Board. Instead, the civil complaint prays for damages resulting from the commission of the following unlawful acts: (1) trespassing on restaurant property; (2) mass picketing; (3) interfering with ingress or egress; (4) engaging in violence, threats of violence or intimidation; and (5) publishing false and misleading statements concerning the Respondent's business, officers, employees, or practices, including "misrepresenting the nature or substance of the matter now pending before the National Labor Relations Board as Case No. 28-CA-4970." According to Respondent, the defendants in the civil suit have publicly distributed leaflets accusing Respondent of discharging Helton for union activity, of making "unwarranted sexual advances" at employees, and maintaining a "filthy restoom" with malicious intent to injure its business. The Respondent claims that under *Power Systems*, the issue before me is whether the Respondent had a "reasonable basis for the filing of a lawsuit," contending, of course, that it did, since the stated purpose was "to bring an end to the distribution of leaflets which contained statements that the managers believed to be personally and professionally defamatory."

Respondent contends further that if its civil suit was lawful, and if the discovery obtained in conformity with the state court order was relevant to the civil suit, then the discovery was lawful, and whether it would be relevant to, or utilized in another proceeding, is totally immaterial.

Conclusions

1. The Civil Suit

In *Power Systems*, the Board determined that since the employer did not have a reasonable basis for the filing of its lawsuit, that the lawsuit had as its purpose the unlawful objective of penalizing the employee for filing a charge with the Board, thus depriving him of, and discouraging employees from seeking, access to the Board's processes, in violation of Section 8(a)(4) and (1) of

the Act. In denying enforcement of the Board's Order, the Court of Appeals concluded that the stipulated record did not support the Board's determination that *Power Systems* had no reasonable basis for its suit against the employee, and consequently the inference that the suit had as its purpose the unlawful objective of penalizing the employee for filing a charge with the Board, could not stand. The Court went on to state, however, "We recognize that civil actions for malicious prosecution carry with them a potential for chilling employee complaints to the Board and that the Board may, in a proper case, act to curb such conduct." In my view, this is a proper case to do so. I conclude, on the basis of the record and from my observation of the witnesses, including their demeanor, and upon the extensive briefs of the parties, that the Respondent did not have a reasonable basis for the filing of its lawsuit, and that its effect has been to discourage employees from seeking access to the Board's processes.

The genesis of the civil suit is the leaflet distributed by Helton and the others and the picketing associated with it. By interpreting the leaflet to mean something other than what it literally states, the Respondent claims that the statements were made with malice, i.e., knowledge that they were false, and with an intent to damage the Respondent.

The civil complaint alleges that, contrary to the signs carried and statements made by the "defendants," no boycott or strike was in progress. The legend on the picket signs declared a boycott, and the presence of the waitresses who withheld their services when they walked off the job on September 18 in protest over Helton's discharge, and over the July 25 meeting, together with the complaints outlined in the leaflet, clearly establish the existence of a strike. Further, Rudy Johnson heard Scott say that the pickets were on strike. Any contention to the contrary is pure folly.

The civil complaint alleges that the leaflet contained false and outrageous statements, including: (1) misrepresentations of proceedings pending before the National Labor Relations Board; (2) accusations that the waitresses had complained about "unwarranted sexual advances" and about "a filthy restroom for women employees, with no soap, paper towels or toilet tissue provided"; (3) oral statements maligning the Respondent and their business to Respondent's employees, customers, passersby and other persons.

The leaflet requires close examination. It states that the Board issued a complaint against the Respondent as a result of charges filed by Helton, who was fired August 8 after suggesting other

employees should organize a union. It is a fact that on September 20 the Board issued a complaint against Respondent as a result of a charge filed by Helton who was fired on August 8, and that the gist of the complaint is that Helton was discharged after attempting to organize the other waitresses. An entirely true statement, and the formal exhibits show Respondent's counsel received a copy of the complaint on September 21, several days prior to the filing of the civil suit. The facts surrounding Helton's discharge have convinced me, as found earlier, that Helton was discharged for engaging in union activities, that agents of Respondent were aware of her activities, that antiunion sentiment had been expressed over a period of several years by Respondent's agents, and that the reasons advanced by the Respondent for Helton's termination were false. Hence, it is clear that the leaflet does not contain a misrepresentation concerning the Board's proceeding as the Respondent contends.

The civil complaint alleges the leaflet contained a false and outrageous statement that the waitresses had complained about "unwarranted sexual advances" and about "a filthy restroom for women employees, with no soap, paper towels or toilet tissue provided." Contrary to the Respondent's allegation, the leaflet does not state that the waitresses "had complained" about those matters. However, as found earlier herein, Helton's testimony that she had told Gay about both an unwarranted sexual advance toward her, and that the women's restroom was filthy, the latter remark having been overheard by Gene Johnson, were not refuted in this record. Further, the evidence establishes the truthfulness of all six "waitresses' complaints" listed in the leaflet. Therefore, it is clear the leaflet contains no misrepresentations concerning waitresses' complaints.

The civil complaint alleges, without specifying, additional outrageous and false statements maligning it were made by the protesters. The record contains no evidence capable of such a construction.

The civil complaint alleges the protesters clogged the sidewalk, harassed Respondent's customers and employees, and blocked ingress and egress from the restaurant. The evidence fails to support any of these contentions.[24] It is significant that after hearing testi-

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[24] Rudy Johnson testified pickets didn't block ingress or egress. Further, while he testified he called the police during the picketing, there was no evidence this was done because they had engaged in any unlawful conduct. Rather, he testified he called the police to advise the pickets of their rights.

mony on November 16, the state court denied Respondent's request for a preliminary injunction and dissolved the temporary restraining order.

Other significant factors in determining the Respondent's real motive in filing the civil suit are two incidents that occurred on September 20, the first day of picketing, and prior to the distribution of the leaflets: (1) Sturgeon's threat to "get even" with Helton for picketing Respondent's premises; and (2) Gene Johnson's veiled threat to Carl Nichols with respect to losing the new home the Nichols had just bought, and that she would hate to see them "get hurt by all this." These statements presage the Respondent's later action, i.e., the filing of the civil suit, and establish the true purpose behind the lawsuit was to punish Helton for having filed the charge in Case No. 28-CA-4970, and to punish the picketers for engaging in protected concerted activity, and to prevent them from further asserting those rights.

As the General Counsel had issued a complaint so alleging, I conclude that Helton had a reasonable basis upon which to form a belief that she had been unlawfully discharged at the time the leaflet was circulated and that the waitresses complaints listed thereon were valid. In my view, the Respondent had no reasonable basis upon which to assert that the filing of Helton's charge with the Board, and that the publication of the leaflet was made, without probable cause. Respondent's lawsuit placed its employees on notice that if an employee files charges with the Board, or makes public a dispute with the Respondent, that employee is subjecting himself to the possibility of a lawsuit which will require immediate expense by having to hire private legal counsel to defend against the lawsuit and to face the possibility of having to reimburse the Respondent for legal fees and damages if the state court upholds the Respondent's claim. Even if the Respondent's lawsuit is dismissed by the state court, Helton and the other picketers will have been required to pay legal fees as a direct consequence of her having filed a charge with the Board. Accordingly, I find that the Respondent's lawsuit is an attempt to penalize Helton for having filed charges with the Board, and to penalize the other defendants for assisting Helton in her protest of the unfair labor practice committed against her, thus, the Respondent has violated Section 8(a)(4) and (1) of the Act. *The United Credit Bureau of America, Inc.*, 242 NLRB No. 138 (1979); *George A. Angle*, 242 NLRB No. 112 (1979); *Power Systems, supra*.

The Depositions

In conducting the depositions of Helton and other employees and former employees of Respondent, Respondent's counsel directed numerous questions toward the nature and extent of Helton's union activities, the union activities of other employees, supervisory knowledge of these activities and Respondent's antiunion animus. In addition, Respondent asked numerous questions regarding purported violations of restaurant policies, in an obvious maneuver to establish a defense to Case No. 28-CA-4970.

Since these same activities and subject matter were also at the time of the taking of the depositions the subject of a pending Board proceeding, the General Counsel contends that the giving of state court notices to employees and former employees that they were required to submit to deposition by Respondent's attorney and the subsequent taking of those depositions constituted an unlawful interrogation in violation of Section 8(a)(1) and (4) of the Act.

Rule 30(a) of the Arizona Code of Civil Procedure which was patterned directly after Federal Rule 30(a) provides:

> After commencement of the action, any party may take the testimony of any person, including a party by deposition upon oral examination. Leave of the court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service which is completed under Rule 4(e) . . .
>
> * * *
>
> The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

Rule 26(b)(1) of the Arizona Code regarding the scope of discovery states:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party . . .

It should be noted that typically a party does not have to obtain leave from court to obtain depositions under the Arizona Rules and he does not have to show good cause. Additionally, there is no restriction on the scope of the matters which he can discover. It was pursuant to these broad provisions of the Arizona Code of Civil

Procedure that Respondent obtained the depositions of its employees and former employees.

In stark contrast to the liberal discovery rules of Arizona, Section 102.30 of the NLRB Rules and Regulations provides that testimony may be taken by deposition only upon application to the regional director prior to the hearing and to the administrative law judge during and subsequent to the hearing and, most importantly, good cause must be shown to obtain a deposition order.

While there has been some dispute within the Federal Courts of Appeal regarding the interpretation of the good cause requirement of Section 102.30 (for example, the Fifth Circuit has held that the requirement can be satisfied by simple discovery needs, *N.L.R.B.* v. *Miami Coca-Cola Bottling Co.*, 403 F.2d 994, 996 (C.A. 5, 1968); *N.L.R.B.* v. *Safway Steel Scaffolds Co.*, 383 F.2d 273 (C.A. 5, 1967), *cert. denied*, 390 U.S. 955 (1967), but this particular view has not generally been accepted by the other Circuits and was persuasively refuted in *N.L.R.B.* v. *Interboro Contractors, Inc.*, 432 F.2d 854, 859 (C.A. 2, 1970)), the Board has consistently held the good cause requirement to mean that depositions may be taken for use as evidence in an action when there is reason to believe that the witness whose deposition is sought may be unavailable at the hearing, and that the Rule was never intended to provide for the taking of depositions solely for discovery purposes when witnesses will be available for trial. *N.L.R.B.* v. *Interboro Contractors, supra*, 857-858; *Title Guarantee Co.* v. *N.L.R.B.*, 534 F.2d 484 (C.A. 2, 1976).

The rationale underlying the Board's limitation on the taking of depositions for the purpose of pre-trial discovery is "Based not only on the cost and inconvenience full discovery would impose on administrative proceedings but also on the peculiar nature of a labor dispute, . . . Board witnesses and other persons with relevant information are typically employees of the company defending an unfair labor practice charge. The company's position of control over the persons' livelihoods mandates protection that is not usually necessary in ordinary litigation." *P.S.C. Resources* v. *N.L.R.B.*, 576 F.2d 380, 386-387 (C.A. 1, 1978).

Though Respondent's attorneys, therefore, could not have taken the depositions of Helton and the other employees consistent with the Board's rules, they were not completely precluded from legitimately interrogating employees on matters involving their Section 7 rights. Interrogation for "legitimate cause" can be conducted without incurring Section 8(a)(1) liability where it is directed toward

"the investigation of facts concerning issues raised in a complaint where such interrogation is necessary in preparing the employer's defense for the trial of the case." *Roadway Express, Inc.*, 239 NLRB No. 76 (1978), slip op. p. 22, quoting *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enforcement denied on other grounds, 344 F.2d 617 (1965). However, in pursuing such an investigation in preparation for trial, certain safeguards established by the Board in *Johnnie's Poultry* and *Roadway Express* must be observed and if transgressed by an employer would constitute a violation of Section 8(a)(1):

> [T]he employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the question must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. *Johnnie's Poultry, supra*, at 775.

As General Counsel contends, Helton and the other defendants named in the civil suit were not deposed voluntarily and only submitted upon being subject to legal process. There were no assurances that reprisals would not be taken and the questions asked far exceeded the relevance to the libel and wrongful interference suit. On the other hand, the questioning explored in depth Helton's union activities, which were the subject of a pending Board hearing. Many questions were also directed at discovering the union activities of other employees and knowledge of union activities on the part of a supervisor. Still others explored the strength of the Respondent's defense to the unlawful discharge allegation. These circumstances would adequately support an inference that the questioning in this particular subject area was directed more toward discovering evidence and examining potential witnesses for the Board hearing than for preparation for the state civil suit. In that sense, it could be said that the full purpose of the questioning was not conveyed to the employees interrogated.

Absent the state court's imprimatur on the interrogation by deposition, the questioning under the circumstances of this case would necessarily have to be considered coercive within the meaning of Section 8(a)(1).

Respondent's utilization of Arizona's liberal discovery rules to obtain the depositions of its employees in furtherance of a separate state action effectively allowed Respondent to bypass the Board's established procedures and obtain through the backdoor evidence which was closely associated with the issues in the pending Board hearing. Consequently, it is necessary to determine whether the NLRB's stricter discovery procedures pre-empt the state's looser standard to the extent that the Board's stricter standards are implied within a state court discovery order affecting a pending Board proceeding and involving essentially the same parties and many of the same issues. Additionally, it must be determined whether the failure to observe these stricter standards violates Section 8(a)(1) of the Act.

Respondent cites *Jay V. Zimmerman Co.* v. *National Mask & Puppet Corp.*, 13 F.R.D. 172 (E.D.N.Y., 1952) to support its contention that discovery in a separate action is not precluded even though it may impinge on proceedings in another action. The *Zimmerman* case was an action for unfair competition wherein defendants moved for a protective order respecting the taking and subject matter of their depositions. The District Court held that although the precise issues in the case were not identical to those involved in an interference proceeding in the Patent Office between the same parties, the fact that supporting evidence in one might tend to impinge upon the other was not sufficient in absence of facts to support an inference that plaintiff was seeking to subvert the Rules of the Patent Office.

The key to the *Zimmerman* case was not, therefore, that the possibility that discovery in one action might impinge on the proceedings of another action was insufficient to restrict that discovery, as Respondent contends. Rather, the holding was that the defendants had failed to allege any facts that the plaintiff was seeking to subvert the Rules of the Patent Office.

In the present case, the broad exploration of matters intimately connected with the pending Board action, and only tangentially associated with the state suit, amply supports an inference that at least part of Respondent's purpose was to go around the Board's restrictive discovery rules, thereby, subverting the meaning and purpose behind these Rules.

It is this manner of utilizing liberal state discovery provisions to get around the Board's rules that leads directly to the question of whether through preemption, the Board's rule impliedly restricts the reach of the state court's discovery order.

Recently the Supreme Court has reviewed the doctrine of preemption in labor law cases in *Farmer* v. *Carpenters*, 430 U.S. 290 (1977). The *Farmer* case was a tort action brought in California state court for damages against unions and union officials alleging that they had intentionally caused the plaintiff to suffer severe emotional distress. In deciding this case, the Supreme Court recognized the competing interests which have shaped the doctrine of preemption as it related to labor law:

> On one hand, this Court has recognized that "the broad powers conferred by Congress upon the National Labor Relations Board to interpret and enforce the complex Labor Management Relations Act . . . necessarily imply that potentially conflicting 'rules of law, of remedy, and of administration' cannot be permitted to operate . . . ." On the other hand, because Congress has refrained from providing specific directions with respect to the scope of preempted state regulation, the Court has been unwilling to "declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions . . . ." *Farmer* v. *Carpenters, supra,* at 295-296. [Citations Omitted.]

The Court in *Farmer* went on to reaffirm the general rule regarding preemption which was formulated in *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236 at 244 (1959):

> When it is clear or may be fairly assumed that the activities which a State purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

The Court recognized exceptions to the *Garmon* rule in appropriate classes of cases where the activity "was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Farmer, supra* at 296-297, quoting *Garmon, supra* at 243-244. Among the exceptions to the preemption rule the Court has recognized are cases involving libel (*Linn* v. *United Plant Guard Work-*

ers, 383 U.S. 53 (1966)) and mass picketing and threats of violence (*Automobile Workers* v. *Russell*, 356 U.S. 634 (1958)).

Clearly, the suit brought in Arizona state court by Respondent would fall within the recognized exceptions to the preemption rule. However, the fact that a state court may properly exercise jurisdiction over the suit does not permit that court to determine the case without regard to the limitations imposed in furtherance of a national labor policy.

For example, to minimize the possibility that state libel suits would either dampen the free discussion characteristics of labor disputes or become a weapon of economic coercion, the Supreme Court in *Linn* adopted by analogy the standards enunciated in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), holding that state damage actions in the labor context would escape preemption only if limited to defamatory statements published with knowledge or reckless disregard of their falsity. The Court also required that the plaintiff show the statements caused actual injury. Additionally, the Court stressed the responsibility of the trial judge to assure that the damages were not excessive.

In *Farmer* v. *Carpenters, supra* at 305, the Supreme Court imposed limitations upon actions for intentional infliction of emotional distress arising out of a labor setting because of the potential interference with federal regulation.

These cases clearly demonstrate that where a state court assumes jurisdiction over a case arising out of a labor setting, its jurisdiction is carefully circumscribed and the state court's actions remain subject to implied restrictions dictated by the potential of interference with the national labor policy — restrictions that would not be present in suits arising from non-labor related circumstances.

The Arizona discovery rules applicable in this case not only pose a potential for interference with the national labor policy, but directly conflict with the rules of the Board. Whether the Arizona rules are preempted, therefore, requires "a balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation." *Farmer* v. *Carpenters, supra* at 300.

In modelling its discovery procedures upon the Federal Rules of Civil Procedure, Arizona revealed a similar purpose as that embodied in the Federal Rules of promoting judicial efficiency and to provide full disclosure of all facets of a law suit. (See generally, 4 Moore's Federal Practice, Paragraph 26.02.)

On the other hand, as noted previously, the rationale behind the Board's severe restriction of discovery is to protect ". . . witnesses and other persons with relevant information and to avoid the cost and inconvenience of full discovery." *P.S.C. Resources, Inc.* v. *N.L.R.B., supra* at 386-387. Furthermore, "The Board's procedures [restricting discovery] are reasonably designed to forestall such intimidation and harassment as would otherwise be possible because of the leverage inherent in the employer-employee relationship." *N.L.R.B.* v. *Lizdale Knitting Mills, Inc.*, 523 F.2d 978, 980 (C.A. 2, 1975).

Additionally, allowing broad discovery of evidence pertaining to a matter pending before the Board would necessarily disrupt the Board's administration of the Act by providing litigants with advance knowledge of the substance of the General Counsel's case by resorting to the expedient of filing a concomitant civil suit in state court. In *N.L.R.B.* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), the Supreme Court viewed with disfavor the prospect of litigants using backdoor methods of gaining access to the substance of the General Counsel's case, viewing such conduct as an "interference" on the ground that such methods would permit "[E]ven without intimidation or harrassment a suspected violator with advance access to the Board's case would 'construct defenses which would permit violations to go unremedied.' " [Citations omitted.] *Id.* at 241. In *Robbins,* the Court refused to allow litigants to gain access under the Freedom of Information Act, to witnesses statements and affidavits made to the Board. It would hardly make sense to allow litigants to gain access to the substance of these statements through the use of state discovery procedures. Such a rule permitting such conduct would certainly promote the filing of suits, meritorious or not, in state courts to take advantage of discovery procedures not available to litigants in a Board proceeding. Therefore, it seems clear that such a result would definitely subvert the purpose and policy of the Board's rules and of the Act.

On the other hand, the potential interference with state regulation is minimal. A policy limiting discovery in state court actions, which are already subject to implied restrictions dictating by the supremacy of a national labor policy, until hearing on a matter involving essentially similar parties, witnesses and issues before the Board would not deny a litigant of a forum. At most, it would stay the proceding of the state action until the Board's hearing was held. Since, traditionally, Board proceedings are conducted at a more rapid pace and much sooner after the filing of the complaint than

is true in state civil suits, the delay to the state court action would not necessarily be burdensome.

Moreover, a litigant would not be altogether restricted in taking depositions, etc., but pending Board hearing, would be required to meet the "good cause" requirement of Rule 102.30 as interpreted by the Board's decisions.

On the balance, therefore, it appears that the federal interest underlying the Board's restrictive discovery rule is much greater than that which serves as the basis for the Arizona rule. Also, the danger of interference to the Board's Administration of the National Labor Relations Act by failing to limit the state court discovery procedures is very much greater than the potential for interference with the state proceedings. Reflecting this failure of the state's interests to adequately counterbalance the strong federal interest, it would seem imperative that any state court discovery order would necessarily contain within it by implication the Board's restrictive discovery rule regarding matters affecting a pending Board hearing.

Since the state court's jurisdiction was limited by the superior Board regulation, the state court's discovery order could not extend beyond th discovery permitted under Board procedures. When Respondent exceeded the implied limitations imposed by the Board's regulations, it was venturing into an area where its conduct was not protected by the state court discovery order and that order would not immunize that conduct from scrutiny by the Board. Since, as noted previously, the manner in which Respondent's attorneys interrogated (acting as its agents) could be considered coercive, it follows that the taking of the depositions of Helton and other employees and former employees of Respondent, in a manner which would not have been permitted by the Board, was a violation of Section 8(a)(1) of the Act.

The present case was not a situation in which counsel in taking depositions in an unrelated matter unwittingly crossed over into an area protected by the Act. On the contrary, Respondent's counsel was a capable and experienced labor attorney who was aware of exactly what he was doing when he specifically requested a court order allowing him to question Respondent's employees and former employees, subject only to the restriction that he not ask the witnesses about their statements to the Board, but with no restriction as to the substance embodied in those statements to the Board. Such circumstances strongly militate toward a conclusion that the conduct of Respondent's counsel constituted a violation of the Act. Accordingly, I find that Respondent, in furtherance of its civil action

threatened to depose and deposed employees, former employees and their spouses regarding the Union and concerted activities of its employees, including the Union and concerted activities of Helton, in violation of Section 8(a)(4) and (1) of the Act as alleged in Paragraph 14 of the complaint.

Conclusions of Law

1. Bill Johnson's Restaurants, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging Myrland R. Helton on August 8, 1978, because of her union activities, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

3. By interrogating an employee on August 10, 1978, regarding the union activities of other employees, the Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

4. On September 18, 1978, Respondent's employees Cheryl Nichols, Carla Scott and Dale Michaud ceased work concertedly and went out on strike in protest of the unlawful discharge of Helton, and at various times since said date, those employees, the spouses of certain employees and former employees of Respondent have picketed to protest the Respondent's unfair labor practices.

5. By threatening to bring reprisals upon employees for engaging in protected concerted activities, including the filing of a charge with the Board and the picketing of Respondent's premises, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(4) and (1) of the Act.

6. By making a veiled threat against the husband of an employee and his wife for having engaged in protected concerted activities, the Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(4) and (1) of the Act.

7. By interrogating a former employee on October 3, 1978 regarding said employee's union activities and her knowledge of the union activities of others, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(4) and (1) of the Act.

8. By filing a civil complaint in the Superior Court of the State of Arizona, in and for the County of Maricopa, against Myrland R. Helton, John Helton, Barbara Orr, Lawrence Orr, Cheryl

Nichols, Carl Nichols, Carla Marie Scott, Debra Mackie, Dale Michaud and Jane and John Does I through X, alleging the defendants made false and misleading statements with respect to a proceeding pending before the National Labor Relations Board, and with respect to other employee complaints against Respondent, and seeking to recover compensatory and punitive damages and an injunction against said individuals, which action was brought for the purpose of impeding the Board's processes and interfering with the prosecution of an unfair labor practice charge filed by Myrland R. Helton, the Respondent has violated Section 8(a)(4) and (1) of the Act.

9. By threatening to depose, and by deposing the defendants in the State of Arizona civil proceeding regarding the union and concerted activities of its employees, including those of Myrland R. Helton, the Respondent has violated Section 8(a)(4) and (1) of the Act.

10. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that the Respondent be required to offer Myrland R. Helton immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of such discrimination, by payment of a sum of money equal to that which she normally would have earned as wages from the date of her discharge on August 8, 1978, to the date of said offer of reinstatement, less her net earnings during such period with backpay computed on a quarterly basis in the manner established by the Board in *F.W. Woolworth Company*, 90 NLRB 289 (1950), and with interest hereon as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[25] It is also recommended that Respondent make available to the Board, upon request, all

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[25] See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

payroll and other records to facilitate checking the amount of earnings due. It has been found that the Respondent did not have a reasonable basis for the filing of a civil complaint in the Superior Court of Arizona, in and for the County of Maricopa, seeking damages and injunctive relief. It has further been found that the Respondent, in furtherance of its civil suit, threatened to depose and did depose employees, former employees and their spouses regarding the union and concerted activities of its employees. By such conduct, the Respondent has discriminated against its employees in the exercise of their right to file charges or otherwise give testimony under the Act, and has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act. In order to dissipate the effect of the Respondent's unfair labor practices, it shall be recommended that the Respondent cease and desist from prosecuting its complaint which arose out of Myrland R. Helton's filing of unfair labor practice charges with the National Labor Relations Board, and the concerted protected activities engaged in by its employees, former employees and their spouses, and that the Respondent be required to withdraw said civil complaint. In order to place Helton and the others who engaged in the picketing of Respondent's premises in the position they would have been absent the Respondent's Section 8(a)(4) and (1) violations, it is recommended that the Respondent make the defendants in the civil complaint whole for all legal expenses incurred in the defense of Respondent's lawsuit.[26]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:[27]

ORDER

The Respondent, Bill Johnson's Restaurants, Inc., its officers, agents, successors and assigns, shall:

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[26] *George A. Angle, supra; Power Systems, Inc., supra.*

[27] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Discharging employees because of their union interest or activities.

(b) Interrogating employees or former employees regarding their union activities or the union activities of others.

(c) Threatening to bring reprisals upon employees or their spouses for filing a charge with the National Labor Relations Board or for picketing their premises, or for engaging in other protected concerted activities.

(d) Prosecuting its complaint in the Superior Court of the State of Arizona, in and for the County of Maricopa, styled as Bill Johnson's Restaurants, Inc., An Arizona Corporation, *et al.* v. Myrland R. Helton, *et al.*, No. C375470, including threats to depose and deposing the defendants in said action.

(e) In any other manner interfering with, restraining or coercing its employees in the exercise of rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Myrland R. Helton immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered as a result of the discrimination against her in the manner described above in the section entitled "The Remedy."

(b) Withdraw its complaint styled as Bill Johnson's Restaurants, Inc., An Arizona Corporation, *et al.* v. Myrland R. Helton, *et al.*, No. C375470, which Respondent caused to be instituted in the Superior Court of the State of Arizona in and for the County of Maricopa.

(c) Reimburse the Charging Party, Myrland R. Helton, and all other named party defendants, for all legal expenses incurred in the defense of said lawsuit, including expenses incurred in relation to Defendants' Answer and Counterclaim.

(d) Post at each of its restaurants located in Phoenix and Mesa, Arizona,[28] copies of the attached notice marked "Appen-

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[28] As the temporary restraining order limited picketing at each of the Respondent's business establishments, I conclude it will best effectuate the policies of the Act to require the notice be posted at each of said premises.

dix."[29] Copies of said notice on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that Paragraph 8(b) of the complaint as amended in Case No. 28-CA-5041 be, and it hereby is, dismissed.

Dated: SEP 27 1979

/S/James S. Jenson

James S. Jenson
Administrative Law Judge

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[29] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board having found, after a hearing, that we violated Federal law, we hereby notify you that:

WE WILL NOT discharge employees because of their union or other protected concerted activities.

WE WILL NOT question any of our employees or former employees regarding their union activities or union activities of others.

WE WILL NOT threaten to bring reprisals upon employees or their spouses for the filing of charges with the National Labor Relations Board or for picketing our premises or for engaging in other protected concerted activities.

WE WILL NOT file a civil lawsuit against our employees, threaten to depose or depose them, for engaging in protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer to Myrland R. Helton immediate and full reinstatement to her former or substantially equivalent position without prejudice to her seniority or other privileges, and WE WILL reimburse her for any loss of earnings she may have suffered because we discharged her, together with interest.

WE WILL withdraw the complaint styled as Bill Johnson's Restaurants, Inc., An Arizona Corporation, *et al.* v. Myrland R. Helton, *et al.*, No C375470, which we caused to be instituted in the Superior Court of the State of Arizona in and for the County of Maricopa, which we filed and maintained because Helton utilized the processes of the National Labor Relations Board, and WE WILL reimburse Myrland R. Helton and all other named party defendants for all legal expenses incurred in the defense of said lawsuit, including expenses incurred in relation to Defendants' Answer and Counterclaim.

BILL JOHNSON'S RESTAURANTS, INC.
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office. 3030 N. Central Ave, 2nd Floor, Box 33069, Phoenix, AZ 85067 Telephone Number: (602) 261-4005.